The CORPORATION JOURNAL

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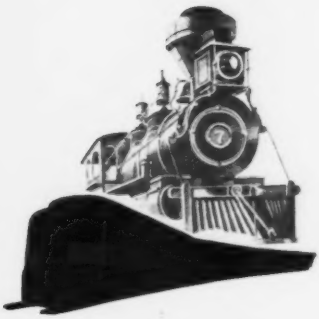
Vol. 20, No. 9 December 1952–January 1953 Complete No. 382



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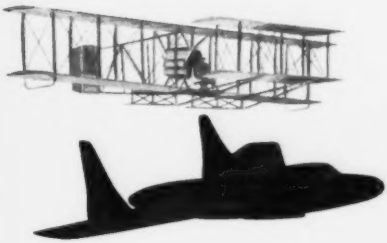

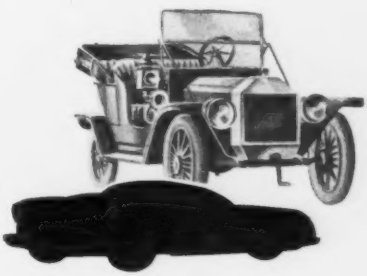

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a decisive date

JANUARY 1 has been found a date of striking significance by attorneys for corporations under circumstances where the following corporate procedures are under consideration:

(1) Incorporation.
(2) Qualification to do business.
(3) Withdrawal from foreign states.
(4) Dissolution.

The time when these events are concluded has a definite bearing upon the state taxes to be paid during the year beginning January 1 in a large number of states.

For instance, if a company is incorporated and also obtains authority to do business in several states—all shortly prior to January 1—it is possible that it may be required to pay substantial state taxes in the following year, beginning January 1, to its home state or to other states, or perhaps to both, which would not have been payable for that year had its incorporation and such qualification been *delayed* for a short period extending to a date after January 1.

Usually investigated by counsel in such a setting are state franchise taxes, income taxes, ad valorem property taxes, chain store and other occupation license taxes, concerning their possible application to the proposed corporation, and to any other corporation which is about to obtain authority to do business in a state other than that of its incorporation. Since there are forty-three states where January 1 is a significant date, having a bearing upon one or more of the taxes enumerated, and less than a half dozen states, Illinois, Maine, Nebraska, Nevada and Wyoming, where this date has little or no importance, it will be understood why it is customary for counsel to make inquiry into the feasibility of postponement of incorporation or qualification, or both.

With reference to such incorporation or qualification, perhaps the ten states in connection with which January 1 would be of most interest, in the approximate order of their importance, might be Georgia, Maryland, Virginia, Iowa, Louisiana, Mississippi, Alabama, Colorado, Kentucky and Missouri.

Likewise, similar savings related to the coming year have been found available by counsel, where the formal withdrawal of foreign corporations from the doing of intrastate business in states in which they have been licensed is *accelerated* so as to be effective before January 1, or where the dissolution of a corporation is *accelerated* so as to be completed before January 1.

With reference to dissolution or withdrawal, possibly the ten states in connection with which January 1 would be of most interest, in the approximate order of their importance might be Georgia, Louisiana, New Mexico, Texas, Utah, Virginia, Colorado, Kentucky, Maryland and Massachusetts.

Coupled with the non-payment of taxes under circumstances where savings may be effected is the elimination of the necessity of the time-consuming preparation and filing of the corresponding tax reports upon which the taxes, otherwise payable in the year following, would normally be computed.

domestic corporations

DELAWARE

Stock option plan, approved by directors and ratified by stockholders, upheld by Chancery Court.

The plaintiff, a common stockholder, brought this action to enjoin the effectuation of defendant corporation's so-called Restricted Stock Option Plan For Key Employees, covering a limited number of the authorized but unissued shares of common stock. The company, C. I. T. Financial Corporation, which had been incorporated in 1924, had about 19,000 stockholders, resources in excess of $1,250,000,000., annual earnings before taxes of about $63,000,000., and some 400 branch offices throughout the United States and Canada. It was a holding company which, through its subsidiaries, sold credit services in a highly competitive field, in connection with the financing of such things as automobiles and industrial equipment. The Chancellor observed that the "importance of trained and skilled personnel to defendant's success was clearly demonstrated. Such personnel are by nature of their work in constant contact with opportunities in the same and associated fields."

After a study of numerous stock option plans by a committee of directors not eligible to receive options, the plan under attack was recommended to the board. Fifteen of the twenty-four directors were present. Of these fifteen, ten were "interested" in the sense that they were then potential beneficiaries. The board of directors approved the plan, subject to the approval of defendant's common stockholders. The plan was subsequently approved at a stockholders' meeting by 97.7% of the shares represented at the meeting and by 78.8% of the outstanding shares. Defendant had about 3,580,000 common shares outstanding, of which 2,821,434 were voted for the plan. After it went into effect, options covering 71,456 shares were granted to 125 employees. One group of options were at $47.75 per share and another at $53.00 per share, in each case being in excess of 95% of the market price at the granting date, as required by the plan.

The Chancellor considered numerous objections of the plaintiff to the plan. He found no merit in charges alleging bad faith on the part of the directors in initiating the plan, or in charges concerned with alleged omissions and misrepresentations by directors. As to a charge that the plan was invalid because it was not approved by a valid quorum of directors, since eight disinterested directors — eight being defendant's quorum requirement—did not vote for the plan, no merit was found in this contention, as defendant's certificate of incorporation provided for the counting of interested directors for quorum purposes and the directors' action was taken in order to submit the matter for stockholder approval, such a provision and such an action thereunder having been approved by decisions of the Chancery Court and the Supreme Court of Delaware. As to plaintiff's charges that the plan was invalid for want of consideration, the court concluded there

was legal consideration flowing to the defendant corporation where each optionee bound himself, pursuant to the plan, to a valid two year employment contract in consideration of the option.

As to a charge that the corporation was not receiving a fair return for the options conferred, the court found that the plaintiff had not sustained the burden of proof placed upon her, by reason of independent stockholder ratification, to show that no person of ordinary sound business judgment would say that the consideration received for the options was a fair exchange for the options granted.

The court concluded that the plaintiff had "failed to demonstrate any illegality in connection with the terms of the plan or the options so far granted thereunder."

Kaufman v. Schoenberg et al., Court of Chancery, New Castle County, October 21, 1952. Stanley L. Kaufman of Kaufman, Imberman & Taylor and Joshua Peterfreund of New York City, and William Marvel of Morford, Bennethum, Marvel & Cooch of Wilmington, attorneys for plaintiff. Albert R. Connelly and Edward C. Perkins of Cravath, Swaine & Moore of New York City, and Caleb S. Layton and Henry M. Canby of Richards, Layton & Finger of Wilmington, attorneys for defendants. Commerce Clearing House Court Decisions Requisition No. 482397.

Sec. 28, G.C.L., regarded as conferring on corporation power to reduce capital by purchasing shares for retirement at private sale, without a pro rata offering to all holders of stock of the class affected.

"The essential question presented," said the Supreme Court of Delaware, "is whether a purchase by a Delaware corporation of its own shares at private sale for retirement may be lawfully made without a pro rata offering to all holders of the class or classes of stock purchased."

A competitor of defendant corporation had acquired 2,575 shares of 48,664 shares of Class A common stock of defendant and 134,650 shares of 479,726 shares of Class B, with a view of possible merger of the two companies. The competitor company's holdings were the only large block of shares singly held. The merger negotiations failing, steps were taken by the defendant's board, five of whose twelve members were nominees of the competitor, to eliminate the block of shares held by the competitor. Believing that a public distribution was not feasible, it was determined to make an offer to purchase the shares for retirement. This resulted in an agreement providing for the purchase of the competitor's 2,575 Class A common and 117,425 shares of Class B at a price of $40. a share, for retirement under Section 28 of the General Corporation Law, the purchase to be subject to the approval of defendant's stockholders at a special meeting of the holders of the A and B stock. Negotiations also were entered into with a broker to purchase the balance of the competitor's Class B shares. Upon the giving of notice of the special stockholders' meeting, plaintiffs sought to enjoin the meeting or, alternatively, to enjoin the consummation of the contract. Upon hearing, the Vice Chancellor entered an order denying the application for a restraining order. Thereafter, on the same day the stockholders of defendant met and approved the purchase. Of the shares voted, excluding

those of the competitor, less than three per cent were voted in opposition. The transaction was fully consummated on the same day and the required certificate of reduction was filed and recorded. The next day, plaintiffs appealed to the Supreme Court of Delaware.

That court, after an examination into the history of Section 28 and special consideration of the words "at private sale" contained therein, concluded that the statute provided for three methods of purchase, of which one, "at private sale," could only be interpreted as "by private purchase negotiated directly with one or more shareholders willing to sell, without any pro rata offering." The court was of the opinion "that Section 28 of the General Corporation Law confers upon a corporation existing under it power to reduce capital by purchasing shares for retirement at private sale, without a pro rata offering to all holders of stock of the class affected."

Martin et al. v. American Potash & Chemical Corporation, Supreme Court of Delaware, October 3, 1952. Daniel O. Hastings and Ayres J. Stockly of Hastings, Stockly & Walz of Wilmington, Delaware, (William Gellin of New York, New York, with them on the brief), attorneys for the plaintiffs below, appellants. Edwin D. Steel, Jr., and William S. Megonigal, Jr., of Morris, Steel, Nichols & Arsht of Wilmington, Delaware, (Oliver & Donnally of New York, New York, with them on the brief), attorneys for the defendant below, appellee.

Voting trust agreement ruled invalid where stock certificates were held in another state, pending outcome of litigation there, and could not be so used in Delaware as to comply with mandatory provisions governing voting trusts.

Plaintiff, holder of 50% of the stock of defendant company, sought to invalidate a voting trust agreement and to remove certain voting trustees. An agreement, purporting to be a voting trust agreement, had been executed by the plaintiff and one of the defendants who was then the owner of the remaining 50% of the corporate stock, naming the plaintiff and the two individual defendants as voting trustees. The agreement provided that any two of the three named trustees would have power to vote all of the stock. At the time of the execution of the agreement, the certificates for all of the stock were on deposit with an Ohio bank, under a refunding agreement between plaintiff, the defendant who owned the other half of the shares and the former owners of the stock. There was also outstanding an option agreement for the sale of one-third of all of the common stock. The agreement provided that the certificates should not be deposited with the trustees, but should remain in escrow with the Ohio bank until the date on which the refunding agreement was to expire. Under certain conditions the stock would not be delivered to the trustees at all, in which event the agreement to create the voting trust would be terminated. Until the deposit with the trustees of the certificates, the stock was not to be registered in the names of the voting trustees on the books of the corporation, the agreement providing that the certificates should be considered for the purposes of the trust as if actually deposited with the voting trustees and as if new certificates had actually been issued to them. The cer-

tificates had never been deposited with the voting trustees nor had they ever been registered in their names on the records of the corporation. The record did not disclose that a copy of the agreement was ever filed in the principal office of the corporation in Delaware, as provided by Section 18 of Chapter 65, Revised Code, 1935.

The Court of Chancery, New Castle County, had, in a companion action, *Smith v. The Biggs Boiler Works Company et al.*, 82 A. 2d 372, (The Corporation Journal, October, 1951, page 5), ruled that this voting trust agreement was invalid to the extent that it affected a stockholders' meeting. The court discussed the nature of a voting trust and outlined mandatory provisions of Section 18 of Chapter 65 regarding the deposit of stock under a voting trust agreement, the filing of a copy of the agreement in the principal office of the corporation in Delaware, issuance of certificates to the voting trustees and entry on the books of the corporation. Noting that the stock was no longer subject to the two agreements mentioned and that the stock was still held by the Ohio bank, under a court order in an Ohio court action between the individual litigants in this suit, pending the outcome of the Ohio action, the Court of Chancery concluded that an agreement such as the one before it "does not create a valid voting trust in accordance with the conditions laid down in the statute."

Smith v. The Biggs Boiler Works Company et al., 91 A. 2d 193. David Snellenburg, II, and John Van Brunt, Jr., of Killoran & Van Brunt, of Wilmington, for plaintiff. William E. Taylor, Jr., of Wilmington, for defendants, Commerce Clearing House Court Decisions Requisition No. 480937.

NEW YORK

Director's absolute right to inspect corporate books terminates when he is removed as director while his application is pending before Special Term.

The petitioner director had filed an application against respondent corporation and others, as officers who had or ought to have custody of its books and records, for an order directing defendants to permit him as director to examine the corporate books, records and papers. The Supreme Court, Special Term, entered an order for inspection, and defendants appealed. The Supreme Court, Appellate Division, Second Department, 279 App. Div. 876, 110 N. Y. S. 2d 578, held that removal of applicant as director prior to entry of order deprived him of status entitling him to have absolute right to inspect the corporate books. Upon appeal, the Court of Appeals ruled:

"Order affirmed with costs. A director has an absolute right to inspect the corporate books (Peo. ex rel. Wilkins v. Ascher, 237 N. Y. 574, 143 N. E. 748, Id., 237 N. Y. 630, 143 N. E. 770), but such right terminates when, as here, an applicant for such an order is removed as director while his application is pending before the Special Term. Hafter v. Eagle Fisch Co., Inc., 296 N. Y. 808, 71 N. E. 2d 774."

Overland v. Le Roy Foods, Inc. et al., 304 N. Y. 573, 107 N. E. 2d 74. Max Rothenberg of New York City, for petitioner-appellant. Alfred Sobol (David Gale, of counsel), of New York City, for respondents-respondents.

Sale of banking and fiduciary business by a banking, trust and title insurance company, regarded as sale in regular course of business, not entitling non-consenting stockholders to appraisal of their stock.

Six applications were filed by petitioners, common stockholders of a title guarantee and trust company, for an appraisal and determination of the value of their stock, pursuant to the provisions of Section 20 of the Stock Corporation Law. The corporate respondent had been engaged in the banking, trust and title insurance business, but had transferred its banking business to another trust company and agreed to be no longer engaged in the banking or fiduciary business and to do only title insurance business. The company's board of trustees and its management then determined that all of its assets were not needed for its proper and successful operation and, if retained, would be subject to extremely restrictive provisions of the Banking Law or the Insurance Law. Therefore, at a trustees' meeting a plan was adopted, which was overwhelmingly approved at a stockholders' meeting, but not assented to by these petitioners. The plan provided for a tax free transfer of certain of the company's assets not needed in its operations, providing (1) reduction to one-half of the number of the company's capital shares; (2) increase in the par value from $6 to $8; (3) transfer of $1,000,000 to surplus; (4) transfer to a securities company of certain mortgages, cash and two buildings owned by the company, having a total book value of $2,125,000 in exchange for 489,598 shares of the securities company's stock and (5) distribution share for share of the stock so acquired to the company's stockholders.

Petitioners contended that in effect the transaction was not one in the regular line of the company's business and constituted a sale or conveyance of a substantial part of the company's assets, and was of such a nature and character, and resulting in such a depletion thereof, as to come within the meaning of Section 20 of the Stock Corporation Law, entitling them to the appraisal and determination sought and to a directive to the respondent company to purchase and pay them for their shares at the value so determined.

The New York Supreme Court, Special Term, New York County, Part I, observed that an examination of the cases relating to and dealing with the subject "leads to the conclusion that the sale or conveyance contemplated by Section 20, is such a sale of property and franchises as would close out the business or an integral part of the business for which the corporation was formed." The court viewed the transfers as made by the company in the regular course of its business, and concluded:

"After due consideration it is the ultimate conclusion of the court that the transfers in question did not constitute the sale of property so integral as to be indispensable for the transaction of its ordinary business but was rather a transfer of property not necessary for the successful operation of its business and hence does not come within the purview of Section 20 entitling the petitioners to an appraisal and determination of the value of their stock."

In re Schutte, 114 N. Y. S. 2d 162. Schutte & Hegerman of Brooklyn, for petitioner, Schutte. Nathan Shapiro, of New York City, for petitioner, Robert Miller. Joseph Rogers, of New York City, for petitioners, Gerald S. Miller

et al. Gutterman, Newman & Reichbart, of New York City (Lester Gutterman and Joseph K. Reichbart, New York City, of counsel), for petitioners, Kunin. Joseph V. McKee, of New York City (Joseph V. McKee and John J. Boyle, New York City, of counsel), for respondent corporation.

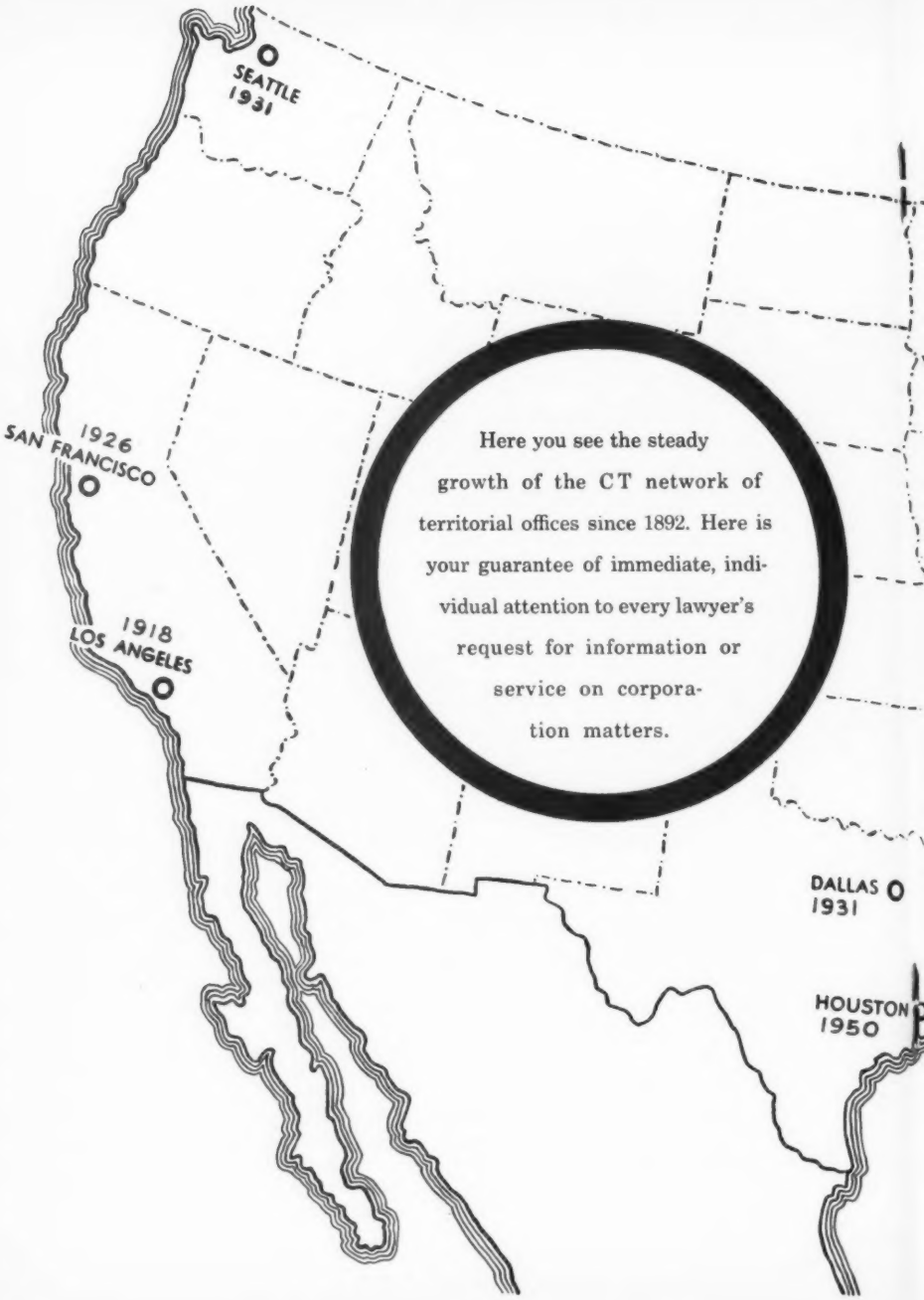
foreign corporations

CALIFORNIA

Foreign corporation, projecting itself into state through authorized local dealer, ruled subject to service of summons effected on Secretary of State as its agent.

The petitioner corporation was a foreign corporation which sought in the California District Court of Appeal, Third District, to obtain a writ of prohibition to enjoin the Superior Court of Sacramento County from proceeding further in an action therein against petitioner and others, in a suit brought to recover damages for conversion of certain property in which, it was asserted petitioner had an interest. Summons was served upon it through the Secretary of State of California. Petitioner alleged it had not and was not doing business in the state, had no place of business there and had not had any agents, or employees or property there. It had appeared specially before the Superior Court for an order quashing the service of summons, but that court had denied its motion and purposed to proceed against petitioner unless prohibited by the District Court of Appeal.

The writ of prohibition was denied, the plaintiff below filing a return showing that petitioner effected sales of its products through an authorized dealer, a California company by means of assignment without recourse of chattel mortgages or conditional sales contracts between dealers and purchasers which it accepted, conditioned also upon the signing by the purchaser of a series of drafts payable to petitioner as installments became due. The equipment purchased was then shipped from Iowa to the California purchaser. In this instance, differences arose between the parties regarding the manner of payment and the petitioner's authorized dealer sought to take possession of equipment sold, seeking authority from the petitioner. It was also alleged that the latter sent a factory representative to put the equipment in good working condition. The court quoted from several California decisions to the effect that the essence of doing business is that the corporation is present within the state sufficiently to constitute it just and equitable that it be amenable to process within the state, and that whether the particular business of the corporation is denominated intra or interstate commerce does not change the fact that it is still doing business in the state.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CINCINNATI
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ATLANTA
1927

Iowa Mfg. Co. v. Superior Court in and for Sacramento County, 246 P. 2d 681. Arthur J. Kennedy of Sacramento, for petitioner. Thomas W. Loris of Sacramento, for real party in interest.

NEW YORK

Court appoints receiver of local property of foreign corporation, consisting of causes of action against certain persons in control of it, although corporation was not itself present within jurisdiction.

This was an ex parte application for the appointment of a receiver for a Republic of Panama holding corporation, not licensed in New York, having no office within the state and not having transacted any business there. It had a stock transfer agency with a New York trust company. The petition was filed by a minority stockholder, a resident of the state, seeking to have a receiver empowered to secure, collect, protect and conserve assets of the corporation within the state for the benefit of the corporation and to hold them subject to the further orders of the court. The assets were said to consist of causes of action against certain persons named in the petition who were residents of New York, and who were in working control of the company, being for breaches of fiduciary duties, waste, mismanagement and improper diversion of the corporate funds in an amount exceeding $1,000,000. for pecuniary losses sustained by the company. It was alleged that, as a result of the operation of the statutes of limitation, there was serious danger that these causes of action would be lost to the company unless steps were taken to preserve them.

The New York Supreme Court, Special Term, New York County, Part II, remarked that the situation presented was an unusual one, as a stockholder's derivative action in behalf of the corporation could not be brought, as the company was in no way present in the state and legal process could not be served upon it. The court observed: "In determining whether to grant or deny the instant application, four questions of law present themselves to the court for consideration and answer, viz., (1) Has this court the jurisdiction to appoint a special receiver of the assets within the State of New York of a wholly foreign corporation? (2) Is a stockholder of a foreign corporation a proper party to make the instant application? (3) If this court has jurisdiction to grant the relief requested, should it, in the exercise of its discretion, grant the relief sought? (4) May the requested relief be granted ex parte, without jurisdiction of the corporation?" The court concluded that it possessed jurisdiction to entertain the application and to grant the relief sought, and continued: "As to the power of the court to appoint a special receiver of the assets of a foreign corporation, which assets are located within this state, the power to appoint such a type of receiver seems authorized in the circumstances here disclosed and such power is said to be inherent in the court." As to the power to grant ex parte the relief sought by this application, it said that "such power resides in the court."

In appointing a special receiver, the court emphasized that he was not a general receiver of the corporation, but was merely a temporary officer given

control over particular assets and possessed only the special and restricted powers conferred by the order of his appointment.

Application of Burge; in re Oceanic Trading Co., Inc., 112 N. Y. S. 2d 906. Martin Evans of New York City, for petitioner.

Unlicensed corporation, having exclusive representative soliciting orders, held not subject to service of process.

The third-party defendant, an unlicensed foreign corporation having its principal place of business in Oregon, moved to set aside service of process upon it on the ground that it was not doing business in New York so as to be subject to jurisdiction. The company had no officer, manager or director in the state, held no directors' meetings there, and owned no real or personal property and maintained no bank account in New York. It had an exclusive eastern sales representative who maintained an office in New York City. Under oral arrangements, this man received an over-all monthly allowance, out of which he was required to pay the entire expense of operating the New York office, including rent, incidentals and salaries of all employees. The corporation's name was listed on the door of the office and in the building directory, as well as in the telephone directory, and its name was prominently displayed on stationery used by the agent. The corporation usually wrote to him on stationery designated as interoffice correspondence.

The Supreme Court of New York, Kings County, granted the motion to set aside service of process, concluding that it had no jurisdiction of the corporation.

Retorto v. Arthur J. Rieser Panel & Veneer Co., Inc., 114 N. Y. S. 2d 459. Morris Goldstein of New York City, for Arthur J. Rieser Panel & Veneer Co., Inc. Cahill, Gordon, Zachry & Reindel, Harold S. Glendening, of New York City, for M. and M. Wood Working Co.

TEXAS

Sale of product by unlicensed foreign corporation in interstate commerce, accompanied by advertising effected by local distributor and incidental storage of product in local warehouse, ruled not a doing of business which would bar corporation from maintaining suit.

The corporation, the plaintiff below, not licensed to do business in Texas, whose right to sue was opposed on that ground, had agents in that state soliciting orders which were transmitted to its home office in Ohio and, upon acceptance, filled by making shipments to designated Texas distributors or jobbers via truck and other common carriers. To that extent, the interstate character of plaintiff's dealings was not questioned. Defendant distributor claimed that plaintiff was engaged in transactions of purely local concern which constituted the doing of business in Texas without a permit in violation of Art. 1529, V.A.S. These were outlined by the Texas Court of Civil Appeals, Dallas, as follows: "Along with the selection of defendant as distributor in the Dallas territory,

plaintiff Company agreed to pay salary and expense of a man to work along with Sloan and his salesmen on both wholesale and retail levels to the end of increased sales, which arrangement continued for several months. A system of advertising was agreed upon with particular reference to its Nu-Maid brand, and through the distributor, extending to retail stores handling plaintiff's products, with cost thereof to be borne equally by plaintiff and defendant. These dealings were initiated and carried on by Heidrich, plaintiff's vice-president, and Coy, its Southern Supervisor, through personal conversations with defendant Sloan, effective only through confirmation at the Home Office. There were also several occasions for plaintiff Company to store quantities of its merchandise in public warehouses, explained by witnesses in this wise: That in one instance, by mistake, an oversupply was shipped to its Fort Worth jobber, and in two other cases the distributors had ceased handling the product, requiring a transfer of the returned merchandise to cold storage (being highly perishable) until later disposed of through orders of other distributors."

The appellate court affirmed a judgment of the trial court overruling a plea of defendant that plaintiff was barred from maintaining of suit based on intrastate transactions without first having obtained a permit, observing: "With reference to the co-operative advertising, charged as transactions of intrastate business, the contracts were likewise between *defendant* and retail outlets, and though on forms suggested by plaintiff, the expense thereof was subject to approval and payment from the Cincinnati office and thereby of interstate character. Similarly so, as to plaintiff's temporary storage of merchandise in public warehouses being viewed as matters ordinarily incident to interstate sales. The statute has no application where the activities in question are merely incidental to the interstate element of the transaction and essential to its completion."

Sloan v. Miami Margarine Co.,* Texas Court of Civil Appeals, Dallas, January 18, 1952: rehearing February 22, 1952. Alexander, George, Russell, Johnson & Passman and Tom E. Bryan of Dallas, for appellant. Storey, Sanders, Sherrill & Armstrong and R. G. Storey, Jr., of Dallas, for appellee. Commerce Clearing House Court Decisions Requisition Nos. 481232 and 481232A.

* The full text of this opinion is printed in the **State Tax Reporter**, Texas, page 10,195.

VERMONT

Service of process upon state official as presumed statutory agent of defendant, upheld in federal court suit between nonresidents.

Plaintiff, a citizen of Texas, sought to recover damages from defendant, a citizen of New York, as a result of a collision between motor vehicles operated by them in Burlington, Vermont. Service of summons in an action in the United States District Court, District of Vermont, which was sought to be dismissed by the defendant, was made upon the latter through service upon the Commissioner of Motor Vehicles of Vermont, a copy being sent to the defendant by registered mail. Chapter 428 of the Vermont Statutes, Revision of 1947, as amended by Public Act 209 of 1951, in effect makes operation of a

motor vehicle in the state equivalent to the appointment of the Commissioner as attorney for the receipt of process in suits growing out of collisions in the state.

The court denied a motion of defendant to dismiss the action. Defendant based his motion on the ground that Title 28, U.S.C.A. Sec. 1391, requires a dismissal when neither party to the suit is a resident of the state. That section provides: "(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside." The court observed that there was obvious need of legislative solution in the field of law in connection with service upon a state officer as an agent to receive service under circumstances such as those before it, noting that a contrary ruling had been made in a decision in the First Circuit in *Martin v. Fishback Trucking Co.*, 183 F. 2d 53.

Reference was made to *Neirbo v. Bethlehem Shipbuilding Corporation*, 308 U. S. 165, 60 S. Ct. 153, 84 L. Ed. 167, where the Supreme Court recognized that the appointment by a corporation of an agent for service of process also constituted a consent to the venue of the Federal court of the district. Also, that in *Knott Corporation v. Furman*, 163 F. 2d 199, 207, certiorari denied, 332 U. S. 809, 68 S. Ct. 111, 92 L. Ed. 387; rehearing denied, 332 U. S. 826, 68 S. Ct. 164, 92 L. Ed. 401, it was held that actual appointment is not necessary, the mere doing of business in the state under a statute by which a state officer is appointed as agent as a matter of law being enough. The court regarded it as logical to conclude from these cases that "what is true as to foreign corporations is true as to nonresident operators of motor vehicles."

Jacobson v. Schuman, 105 F. Supp. 483. Vernon J. Loveland and Donald H. Hackel of Rutland, for plaintiff. J. Boone Wilson and Philip H. Hoff, of Black & Wilson, of Burlington, and A. Luke Crispe of Brattleboro, for defendant.

taxation

CALIFORNIA

Statutory income property-payroll-sales formula ruled applicable where there was failure to show its use would result in taxation of extraterritorial values.

"Appellant is a Delaware corporation engaged in the business of manufacturing and selling various papers for correspondence, business and other uses. It manufactures the papers in several mills located in Holyoke, Massachusetts, where it also has its principal place of business. It sells its products in California and throughout the United States. Its California sales, however, do not include any of the output of two of the mills. Separate accounting rec-

ords are maintained for each of the mills and a computation is made of the income of each on a separate accounting basis."

In preparing its corporation income tax returns for the years 1937 through 1947, appellant completed, in each instance, the schedule for the determination of the percentage of its income allocable to California through the application of the property-payroll-sales formula. The percentages shown in this manner, however, were not used by the company. Instead, it employed a percentage ascertained as follows: "The mills whose products were not sold in California were entirely eliminated from consideration; the ratio of California sales to total sales of each of the other mills in 1946 and 1947, expressed in percentage terms, was applied to the income of that mill to derive an amount of income attributable to California; the total California income so determined for the years 1946 and 1947 was then divided by the total income for those years of such other mills, the percentage thus arrived at being 0.302624; and this percentage was then applied to the total income for each of the years here in question to obtain the appellant's California income for each of those years."

The California State Board of Equalization considered an appeal from the Franchise Tax Commissioner rejecting this method and applying the allocation percentages shown in the returns, for ascertaining appellant's income for each of the years. The Board regarded the company as failing to establish that it was not conducting a unitary business in California and elsewhere, and as failing to show that the use of the formula resulted in the taxation of extraterritorial values. The Commissioner was therefore sustained in applying the percentages shown in the returns.

*Appeal of American Writing Paper Corporation,** State Board of Equalization, July 22, 1952. Charles L. Kirkpatrick, Secretary, for appellants. Burl D. Lack, Chief Counsel; Crawford H. Thomas, Associate Tax Counsel, for respondent.

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* The full text of this opinion is printed in the **State Tax Reporter**, California, page 12,486.

MICHIGAN

Transactions involving sale and installation, in Michigan, of special equipment on trucks of out-of-state owners, brought into Michigan for that purpose, ruled subject to Michigan sales tax.

"Plaintiff Ashton Power Wrecker Equipment Company, a Michigan corporation, is engaged in the business of installing wrecker equipment and bodies on automobile trucks furnished by and belonging to purchasers of the equipment or bodies. Ashton secures a part of its business from customers outside the State of Michigan through advertisements in trade papers or by direct mail solicitation. It also receives orders through mails and by telephone and telegraph across state lines. Truck chassis belonging to out-of-state customers are brought to plaintiff's place of business in Detroit, where wrecker equipment is installed, and the trucks are then immediately returned to the customer. Ashton contends that such transactions are purely interstate in

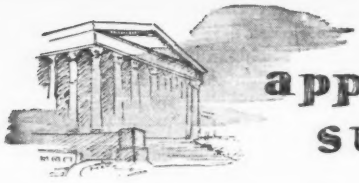
nature and that it is not liable for the payment of a Michigan sales tax upon this portion of its sales. Defendant Department of Revenue, however, under the General Sales Tax Act (Act No. 167, Pub. Acts 1933, as amended, CL 1948, Sec. 205.51-78 (Stat. Ann. Sec. 7.521-49)) levied a deficiency assessment on such transactions in the sum of $4,119.76 and interest thereon of $327.92. This tax was paid by Ashton under protest and suit was brought for its recovery."

The trial court had ruled in favor of the plaintiff, holding that "the whole course of procedure indicated that the matter in contemplation of the parties was one which consisted purely and simply of commercial intercourse across a state line."

Regarding the question of tax liability as an open one, not previously considered by it, the Michigan Supreme Court found authority in numerous decisions of the Supreme Court of the United States, which it cited, to disagree with the trial judge and to hold that the sales tax was lawfully imposed. The court remarked: "In the matter before us both title and possession of the wrecker equipment passed to the purchasers in Michigan. The installation of the equipment was performed within Michigan; material was furnished within Michigan for use on property belonging to parties outside the State of Michigan; and these transactions, although initiated through channels of interstate commerce, were wholly completed within the State of Michigan. These are sufficient local activities upon which to predicate a Michigan sales tax. The interstate aspects of the transactions are only incidental. The fact that other states may impose a use tax upon the same property is immaterial to decision in the instant case."

*Ashton Power Wrecker Co. v. Michigan,** Michigan Supreme Court, March 6, 1952. Frank G. Millard, Attorney General, Edmund E. Shepherd, Solicitor General, and T. Carol Holbrook and William D. Dexter, Assistants Attorney General, of Lansing, for appellant. McInerney & Swaby of Wyandotte, for appellee. Commerce Clearing House Court Decisions Requisition No. 470211. *(Appeal filed in the Supreme Court of the United States, September 12, 1952; Docket No. 335; appeal dismissed, per curiam, November 10, 1952. See page 178.)*

* The full text of this opinion is printed in the **State Tax Reporter**, Michigan, page 10,106.



appealed to the supreme court

*The following cases previously digested in The Corporation Journal have been appealed to The Supreme Court of the United States.**

OCTOBER 1952 TERM

ILLINOIS. Docket No. 23. *City of Chicago v. The Willett Co.*, 406 Ill. 286, 94 N. E. 2d 195. (The Corporation Journal, June, 1951, page 353.) Municipal license tax on carters transporting property in intracity, intrastate and interstate commerce. **Petition for writ of certiorari filed, January 12, 1951. April 23, 1951:** "**Per curiam:** The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the Supreme Court of Illinois, for clarification by that court to show, in light of *Minnesota v. National Tea Co.*, 309 U. S. 551; *State Tax Comm. v. Van Cott*, 306 U. S. 511, whether the judgment herein rests on an adequate and independent state ground or whether decision of a federal question was necessary to the judgment rendered." (71 S. Ct. 734.) **Petition for rehearing denied, 71 S. Ct. 853.** (Upon remand for clarification, the Illinois Supreme Court stated that its decision in this case was based upon the uncontested evidence that the plaintiff carrier's interstate, intrastate and intracity business is inseparable. For this reason, the ordinance, though valid, cannot be applied to the carrier involved. *City of Chicago v. The Willett Co.*, 101 N. E. 2d 205.) **Petition for certiorari again filed, March 12, 1952. May 5, 1952:** "The motion to use the certified record in No. 493, October Term, 1950, is granted. Petition for writ of certiorari to the Supreme Court of Illinois granted and case transferred to the summary docket." (72 S. Ct. 1033.) **October 13, 1952.** "The motion to consider transcripts of record and briefs filed in prior causes as having been filed in this cause is granted." (73 S. Ct. 8.)

MICHIGAN. Docket No. 335. *Ashton Power Wrecker Co. v. Michigan*, 2 STC ¶ 250-162. (The Corporation Journal, December 1952–January 1953, page 176.) Sales tax—interstate commerce—installation of wrecking equipment. **Appeal filed September 12, 1952. November 10, 1952:** "*Per curiam:* The motion to dismiss is granted and the appeal is dismissed for the reason that the application therefor was not made within the time provided by law. 28 U.S.C. Sec. 2101(c)."

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* Data compiled from **CCH U. S. Supreme Court Bulletin**, 1952-1953.

regulations and rulings

General — Where it is desired to effect, before the end of the calendar year, either the withdrawal of a foreign corporation from a state in which it had been authorized to do business or the dissolution of a domestic corporation, counsel have usually found that it is advisable to initiate the dissolution or withdrawal proceedings in most states as early as possible. Thus, if there are time-consuming requirements with which compliance must be had, ample provision may be made to satisfy such requirements before the end of the year. Frequently such requirements call for the preparation of income and other tax reports, the auditing of the corporate books, or the obtaining of certificates from various state departments that all taxes due the state have been paid. Inasmuch as, in some instances, a month or more may be consumed in effecting such compliance, it is advisable to investigate and institute dissolution or withdrawal proceedings, wherever possible, well in advance of the close of the year.

Kentucky — If the activities in Kentucky of an out-of-state corporation consist of the supervision of the installation of bakery equipment and the creation of the business of selling the equipment through transient salesmen, the corporation is probably not subject to any tax in Kentucky. (Opinion of the Attorney General, State Tax Reporter, Kentucky, ¶ .408.)

Nebraska — The shares of stock in foreign corporations held by Nebraska residents are subject to the property tax assessment, and no exception can be made where the stock is outside Nebraska because it has been pledged as collateral in connection with an ordinary loan transaction made with an out-of-state bank. (Opinion of the Attorney General to the State Tax Commissioner, State Tax Reporter, Nebraska, ¶ 2547.)

New York — A proposed certificate of incorporation which is so vague and general with respect to its purposes that it cannot be determined what the corporation proposes to do, is not entitled to be filed in the Department of State. (Opinion of the Attorney General, New York Corporation Law Reporter, ¶ 10,596.)

Where a Maryland corporation, previously authorized to do business in New York, bearing the word "Engineering" in its corporate name, is consolidated with a Delaware corporation which is to survive, and is not engaged in professional engineering or land surveying, the consolidated corporation may adopt the name of the Maryland corporation when seeking to qualify in New York. (Opinion of the Attorney General to the Department of State, Division of Corporations, New York Corporation Law Reporter, ¶ 10,601.)

Tennessee — The excise tax law providing that net earnings shall not include dividends from any other corporation paying the excise tax, where such other corporation is a wholly owned subsidiary of the taxpayer, a corporation which owns 76% of the capital stock of one corporation and 88% of the capital stock of a second corporation, the other shares of each belonging to employees of the first corporation, must include the dividends received from the two corporations in its excise tax base. (Opinion of the Solicitor General to the Commissioner of Finance and Taxation, State Tax Reporter, Tennessee, ¶ 14-516.)

some important matters

For December and January

This Calendar does not purport to be a *complete* calendar of all matters requiring attention by corporations in any given state. It is a condensed calendar of the more important requirements covered by the *State Report and Tax Bulletins* of The Corporation Trust Company. Attorneys interested in being furnished with timely and complete information regarding *all* state requirements in any one or more states, including information regarding forms, practices and rulings, may obtain details from any office of The Corporation Trust Company or C T Corporation System.

Alabama — Annual Application Fee for permit to do business due on or before February 1.—Domestic and Foreign Corporations.

Alaska — Annual Corporation Tax due on or before January 1.—Domestic and Foreign Corporations.

Delaware — Annual Report due on or before first Tuesday in January.—Domestic Corporations.

District of Columbia — Annual Report published and filed between January 1 and January 20.—Domestic Corporations.

Application for license in connection with District. Franchise (Income) Tax due before January 1.—Domestic and Foreign Corporations.

Georgia — Annual License Tax Report due on or before January 1.—Domestic and Foreign Corporations.

Iowa — Quarterly Retail Sales Tax Return and Payment due on or before January 20.—Domestic and Foreign Corporations.

Louisiana — Annual Report due February 1.—Domestic Corporations.

Maryland — Quarterly Return of Tax withheld at the source due on or before January 31.—Domestic and Foreign Corporations.

Missouri — Annual Franchise Tax due on or before December 31.—Domestic and Foreign Corporations.

Quarterly Retail Sales Tax Return and Payment due on or before January 15.—Domestic and Foreign Corporations.

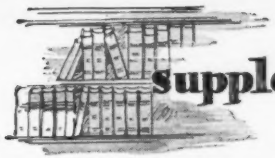
New Hampshire — Annual Maintenance Fee due on first business day of January.—Foreign Corporations.

South Carolina — Annual Statement due January 31.—Foreign Corporations.

South Dakota — Quarterly Retail Sales Tax Return and Payment due on or before January 15.—Domestic and Foreign Corporations.

United States — Fourth Installment of Income Tax due on or before December 15.—Domestic Corporations and Foreign Corporations having an office or place of business in the United States.

West Virginia — Annual Business and Occupation (Gross Sales) Tax Return and Payment due on or before January 30.—Domestic and Foreign Corporations.



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